85-1603

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

HARRY A. STROZZI,
Petitioner,

vs.

COLORADO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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QUESTIONS PRESENTED FOR REVIEW

1. Is Colorado Revised Statutes, § 16-3-102 (1978 Repl.Vol.) unconstitutional in that it relieves an arresting officer with probable cause of the necessity of obtaining an arrest warrant even if practicable and when there are no exigent circumstances?

2. Absent exigent circumstances, is it constitutionally permissible to draw a distinction between a warrantless arrest in a residence and a warrantless arrest in a public place?

3. If so, is the back seat of a police car parked outside an arrestee's motel room a public place?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW I
OPINION BELOW 1
JURISDICTION 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 3

REASONS FOR ALLOWANCE OF THE WRIT—

1. Colorado Revised Statute, § 16-3-102 (1978 Repl. Vol.) is unconstitutional in that it relieves an arresting officer with probable cause of the necessity of obtaining an arrest warrant even if practicable, and when there are no exigent circumstances 12

2. Absent exigent circumstances, it is constitutionally impermissible to draw a distinction between a warrantless arrest in a residence and a warrantless arrest in a public place 22

3. The back seat of a police car parked outside of an arrestee's motel room is not a public place 23

CONCLUSION 24
APPENDIX A1

TABLE OF AUTHORITIES

Cases

Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) 14, 22
People v. Burns, 200 Colo. 387, 623 P.2d 397 (Colo. 1981) 19
People v. Glasener, 191 Colo. 114, 550 P.2d 851 (1976) 17
People v. Hoinville, 191 Colo. 357, 553 P.2d 777 (1976) 10, 17
People v. Tangos, 190 Colo. 262, 545 P.2d 1047 17
People v. Valesquez, 641 P.2d 943 (Colo. 1982) 18
United States v. Miller, 425 U.S. 454, 96 S.Ct. 820, 48 L.Ed.2d 71 (1976) 24
United States v. Santana, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976) 22, 23
United States v. Watson, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976) ..... *passim*

Constitutional Provisions

U.S. Const. Amend. 4 ..... *passim*
U.S. Const. Amend. 14 12
Art. II, Sec. 7, Constitution of Colorado 2, 13, 16, 19

Statutes

18 U.S.C. § 3061(a)(3) 15
28 U.S.C. § 2101(e) 2
Arkansas Statutes 1977 Repl.Vol. § 43-403 18

Colorado Revised Statutes 1978 Repl.Vol. 3
C.R.S. § 16-3-102 .....3, 16, 17, 18, 24
C.R.S. § 16-3-102(1)(a) 3
C.R.S. § 16-3-102(1)(b) 3
C.R.S. § 16-3-102(1)(c) 3, 10, 16, 17
C.R.S. § 16-3-108 17

Florida Statutes Ann. § 101.15 18
Hawaii Revised Statutes (1976 Supp.), § 803.5 18
Idaho Code, § 19-603 18

Rule

C.R.C.P., Rule 4.2 17

Texts

9 Halsbury's Laws of England 459 (1909) 21
John Laurence, *A History of Capital Punishment*, p. 13 (1960) 21
Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541 (1924) 21

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Colorado Court of Appeals and the denial by the Supreme Court of Colorado of petitioner's petition for a writ of certiorari to the Colorado Court of Appeals on January 31, 1986.

OPINION BELOW

The opinion of the Colorado Court of Appeals is reprinted in the Appendix hereto, *infra,* p. A1.

The denial of petitioner's petition for a rehearing is reprinted in the Appendix hereto, *infra,* p. A10.

The order of the Colorado Supreme Court denying certiorari to the Colorado Court of Appeals is reprinted in the Appendix hereto, *infra,* p. A11.

JURISDICTION

The final order denying petitioner's Petition for Writ of Certiorari to the Colorado Court of Appeals was entered on January 31, 1986, and this petition for certiorari is filed within 60 days of the Colorado Supreme Court's order. The jurisdiction of the Court is invoked pursuant to Title 28, United States Code, § 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment to the Constitution of the United States:

> *Searches and seizures regulated.* The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Art. II, Sec. 7, Constitution of Colorado:

> *Security of person and property - searches - seizures - warrants.* The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing.

Colorado Revised Statutes, 1978 Repl.Vol.:

16-3-102. *Arrest by peace officer.* (1) A peace officer may arrest a person when:

(a) He has a warrant commanding that such person be arrested; or

(b) Any crime has been or is being committed by such person in his presence; or

(c) He has probable cause to believe that an offense was committed and has probable cause to believe that the offense was committed by the person to be arrested.

STATEMENT OF THE CASE

Petitioner is an independent trucker who was hired and given a lease by Refrigerated Transport Company (R.T.C.) of Modesto, California, as an owner-operator. The company is primarily involved in the interstate transportation of freight. A certain refrigerated trailer was identified as being owner and operated by R.T.C. On October 28, 1982, the trailer was located in Nogales, Arizona, where it was loaded with shrimp to be hauled by petitioner to Hopkins, Minnesota, to be unloaded with a consignee or a receiver. The shrimp was owned by Ocean Gardens Products, Inc. of California.

The load consisted of 580 cartons of frozen shrimp of a net weight of value product of 29,000 pounds and valued at $204,000.

On October 28, 1982, one Emmit Smallwood, who operated a marina in Leadobend, Louisiana, received a telephone call from a Terry Noe asking him if he wanted to buy some shrimp. Terry Noe, a woman, was known to

Smallwood. She offered to sell the shrimp for two dollars a pound. Smallwood inquired as to whether the shrimp were headless. A short time later, Noe called back and said they were headless and that she had a whole truck full or about 40,000 pounds. Smallwood said he couldn't handle that big a load, but would make some calls. He called the Louisiana State Police and told a Captain McCloud that he felt "something bad was fixing to come down."

A call was received by Smallwood from a Jim Edwards, from somewhere in Arizona, who discussed the shrimp with him, and said that they were on the road in a hurry to get to a "certain point." Edwards said he would call back later that evening. In the meantime, Smallwood was called by the state troopers and told what to do next.

Another call came from Edwards who told Smallwood he could have the truck, trailer, and shrimp for $50,000. Smallwood responded by saying he would be able to get together the sum of $45,000. Edwards told him he had a deal.

Thereafter, a tap was placed on Smallwood's telephone by the Louisiana police and he was told to try to get Edwards to come to Louisiana. Edwards telephoned again and told Smallwood to wire the sum of $1,000 for gas to a 76 truck stop somewhere in Denver. In the meantime, a Lloyd Stewart of the Colorado State Highway Patrol called Smallwood and told him they could set up a buy in Denver, and that Smallwood should try to set it up.

Edwards called from the 76 station and was told by Smallwood that a friend of a friend needed shrimp in

Denver, and it could be handled through there. The name of Summers was given to Edwards.

In the meantime, petitioner's truck and trailer were identified as passing through the port of entry station at Trinidad, Colorado, and was given a port clearance to Denver. Petitioner was also identified as the driver. No effort was made to stop the truck.

Trooper Phillip Waites of the Louisiana State Police called Stewart on the morning of October 29, and requested his assistance by notifying the port of entry people to help identify the truck. The information obtained at the port of entry was called into Denver on the afternoon of October 29, and given to Stewart.

An undercover operation was then set up by the Colorado Bureau of Investigation and the Colorado State Patrol to take place during the evening of October 29.

Edwards had called Smallwood from the 76 station at Golden, Colorado, who told him to call a Lou Summers. Stewart (Summers) called Edwards, set up the location of the buy, and was told by Edwards that he would sell the truck, trailer, and load of shrimp for $45,000. According to Edwards, petitioner and he were to split evenly. At approximately 6:00 P.M. on October 29, two police officers (Barden of the CBI and Stewart) drove to a location in Jefferson County, Colorado, designated by "Lou Summers" (Stewart) where the buy was to take place. They had $25,000 in cash. Edwards was already there with the tractor-trailer. After a preliminary discussion, Edwards agreed to take $45,000 for the tractor-trailer and the load. Edwards told Barden and Stewart that he got $20,000 while petitioner would get $25,000. After examining the cargo and obtaining the manifest,

a packet of bills amounting to $25,000 was given to Edwards by Barden who immediately retrieved it and arrested Edwards.

Edwards was taken to the Jefferson County Sheriff's office, questioned, and implicated petitioner. The agents had documentary evidence taken from petitioner's truck, and it was conceded that the investigation had focused on petitioner, and he was a prime suspect. To further establish probable cause, in addition to Edwards' confession and the documentary evidence, Stewart arranged for a telephone call from Edwards to petitioner, who was staying at a truck stop approximately five miles from the police station. Stewart knew petitioner's room number.

A recording device was placed on the telephone. It was admitted that the purpose of the call was to get more evidence against petitioner. The call was made, recorded, and a transcript later prepared and received in evidence, as well as the cassette. No effort was made to obtain an arrest warrant.

The Wheatridge Police Department called Stewart on the morning of October 30 and advised that petitioner had called and wanted to report his truck as stolen. Stewart told the officer who had called that petitioner was to be arrested if the report was taken. He testified that he had the information from the telephone call, all the telephone calls, and "all the other evidence." It was clear that probable cause had existed from approximately 6:00 P.M. the preceding day.

Corporal Frank L. Nowakowski of the Wheatridge Police Department was dispatched to the Union 76 truck stop located in Wheatridge, Colorado, to take a report from petitioner with respect to the theft of the tractor-trailer

rig. He met petitioner at 8:00 A.M., did not enter petitioner's motel room, but placed him in a patrol vehicle. This was approximately 14 hours after the tractor and trailer had been in the possession of the police, and approximately 13 hours, or even more, after Edwards had confessed and implicated petitioner.

Nowakowski did not advise petitioner of his Miranda rights. He took the report in his patrol vehicle, placing petitioner in the back seat, while he was in the front seat. Petitioner signed the report and was arrested.[1]

Petitioner was interrogated by Stewart and Barden and gave them a confession which was taped and transcribed. During the trial Stewart was permitted to testify concerning petitioner's confession.

Petitioner testified that he had met Edwards at a truck stop in Tucson after he left Nogales, Arizona. He had met Edwards the week before when he arrived in Tucson for the first time. A conversation ensued between petitioner, Edwards, and a J. J. Canfield. They went outside and Edwards made an offer of $25,000. Canfield left while Edwards was making two phone calls. After the second phone call, petitioner told Edwards that he wanted to back out. Edwards said, "There's more than me around here, you've got to go." However, petitioner did not turn the truck over to Edwards or give him the keys so that he had no access to the truck or cargo. But he had to go along with it. He "didn't know how many there was around."

Edwards never left petitioner alone on the trip to Colorado. When he made a phone call at Raton, New Mexico, he directed petitioner to come with him and to stay

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1. Petitioner was never charged with making a false report.

within three or four feet of him. He told petitioner that if he disappeared or "anything like that," they would get him—they would get his family. He used the word "kill." Petitioner did not hear the telephone conversation, nor did he know who Edwards was talking to. In view of the statement made by Edwards, petitioner decided to go on. Petitioner again told Edwards he wanted out. Another call was made at Pueblo, Colorado. Again, petitioner was directed to get out of the truck. He did not know who Edwards called. The same thing happened at Walsenburg, Colorado.

Edwards chose a Union 76 truck stop in Wheatridge, Colorado. Petitioner rented a motel room, but Edwards did not. Petitioner then called his brother and sister-in-law in Loveland, and told his sister-in-law that he had to talk to his brother because he was in trouble. (According to the evidence, no crime had been committed as of this time, at least to petitioner's knowledge.) They said they would be down as fast as they could. Petitioner's two brothers, their wives, and his niece met him at the truck stop. At that time, petitioner did not know that Edwards had obtained possession of one of the two keys petitioner kept for the truck. This knowledge did not come to his attention until he was released from jail. Petitioner had no knowledge of Edwards' dealings with "Lou Summers."

Petitioner never did tell his family what the problem was, and they finally left. During the visit, petitioner started looking for the truck and Edwards. He had no idea that Edwards had a key. The truck was gone. Petitioner did not know that he had made a deal or where he had gone. He never mentioned the name "Lou Summers." He never mentioned any names to petitioner.

Petitioner did not know he was being investigated or that the investigation had focused on him when he received Edwards' call. He did not know Edwards was in custody. He was arrested by Nowakowski after he signed the report.

He was taken to the Wheatridge Police Department where he met Stewart and Barden. Stewart showed him his North Carolina temporary license plates, truck registration, shipping manifest, R.T.C. contract, and all the documents he had in the truck. Stewart then said Edwards was in custody and had made a statement. Also, they had petitioner on tape, and showed him a cassette. Then, his rights were read. As petitioner put it: "I was rattled real well."

From the evidence it cannot be disputed that incriminating statements were obtained by Stewart and Barden subsequent to petitioner's warrantless arrest, after they had shown petitioner the documentation taken from his rig, after they recorded the phone call, and after he was told that Edwards had made a recorded statement.

Petitioner was charged with two counts of theft of things of the value of $10,000 or more, a Class 3 felony. A plea of not guilty was entered to both counts. The case was tried to a jury. The jury reduced one charge of theft to theft of a thing of value of more than $200, but less than $10,000 (trailer), a Class 4 felony, and found petitioner guilty as charged on the remaining count (shrimp). Petitioner was given a suspended sentence and placed on probation.

Petitioner appealed the judgment and conviction which was affirmed by the Colorado Court of Appeals (A1). His petition for a writ of certiorari to the Colorado Court of

Appeals was denied by the Colorado Supreme Court without an opinion (A11).

The unlawfulness of petitioner's arrest was raised throughout the trial by questioning aimed at probable cause and the lack of exigent circumstances.

Petitioner's motion for a new trial was not clear on the question of the unlawfulness of his arrest, but on appeal, it was argued that only probable cause and exigent circumstances served to excuse the Colorado statutory requirement relating to arrest. This was argued although the Colorado General Assembly deleted the language "An arrest warrant should be obtained when practicable" from the arrest statute. C.R.S. § 16-3-102(1)(c). The petitioner relied upon *People v. Hoinville,* 191 Colo. 357, 553 P.2d 777 (1976) as still being the applicable law. In that case the court stated:

> In order to give practical meaning to what the legislature has written, we must hold sub-section (1)(c) to require that police officers must obtain an arrest warrant whenever possible. (Referring to the statute before amendment.)
>
> Such a requirement does not impede effective police action. It does not deprive police officers of the right to make an arrest where exigent circumstances exist. It expresses the view of the American people, as enunciated as early as the discussions of the framers of the Bill of Rights that wherever possible, a neutral magistrate should make probable cause determination. See *Johnson v. United States,* 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948).

(553 P.2d at 781)

The Colorado Court of Appeals considered the argument and stated:

> Even though the report was taken before defendant (petitioner) was arrested, he argues that the theft report was the inadmissible fruit of an illegal arrest. Defendant contends that he was illegally arrested because the police did not have a warrant or exigent circumstances to arrest without a warrant. Defendant does not dispute that the police had probable cause for arrest.
>
> Defendant's argument is based upon the arrest statute before the 1977 amendment that removed the warrant requirement. The law no longer requires an officer with probable cause to obtain an arrest warrant when practicable. *See* section 16-3-102(1)(c), C.R.S. (1978 Repl.Vol. 8). Thus, defendant's claim is without merit.

Thereafter, petitioner filed a petition for a rehearing, which reiterated his argument regarding *Hoinville,* and pointed out in explicit language that if the amended statute is upheld, it collides head-on with the Constitution of the United States and the Constitution of Colorado, and was therefore unconstitutional. This word was substituted for "illegal arrest."

The Court of Appeals was requested to certify the appeal to the Colorado Supreme Court for disposition on the constitutional question. This, it declined to do when it denied petitioner's Petition for Rehearing. The Supreme Court of Colorado also refused to address the constitutionality of the statute by denying certiorari.

REASONS FOR ALLOWANCE OF THE WRIT

1. Colorado Revised Statute, § 16-3-102 (1978 Repl. Vol.) is unconstitutional in that it relieves an arresting officer with probable cause of the necessity of obtaining an arrest warrant even if practicable, and when there are no exigent circumstances.

In Colorado, as in other states, a decision of its intermediate appellate court, here, the Colorado Court of Appeals, is the law of the state if its supreme court declines review.

We shall not be provocative; we shall get to the point immediately, hopefully, with courage, and without any doubt of the righteousness of our position and the basis upon which it rests: *United States v. Watson,* 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976), holding that mere probable cause is sufficient for a warrantless arrest in a public place, is in complete derogation of the intent of the framers of the United States Constitution, is bottomed upon erroneous premises, and has resulted in a plethora of state statutes abrogating the rights secured to citizens by the Fourth Amendment. It is not a true reflection of the common law as the framers saw it, and is utterly without credence since it is mere dicta. It is submitted that it should be reviewed by this Court in order to determine if the Constitution of the United States is able to withstand this erosion of the rights of a private citizen as guaranteed by the Fourth Amendment binding on the states through the Fourteenth Amendment, and whether the case rests on a foundation too flimsy to withstand more judicial scrutiny.

In the ten years since *Watson* was decided, much has happened in the law enforcement field. Practically

all of the states now follow *Watson* although they are not bound to do so. Colorado, which had carefully protected its citizens from unreasonable searches and seizures by constitutional provisions, by statute, and a rule of criminal procedure, has cast all these protections aside, and although its General Assembly saw fit to pass a statute comporting with the teachings of *Watson,* has followed *Watson* as the guiding light in interpreting the Fourth Amendment and a provision in its own constitution even more restrictive. Article II, Section 7, Constitution of Colorado, *supra.*

We ask: Why do the respective states, and even our own respected Supreme Court, find it so easy to bury basic rights of American citizens by their interpretation of the English common law, the hardships allegedly claimed by law enforcement officers, and the large number of states that had chosen, even before *Watson,* to do away with the neutral magistrate and place the sacred right of privacy from unreasonable and often arbitrary arrest in the control of the policemen—an egregious position in view of what has happened, and is happening, in this Twentieth Century.[2] It is mind-boggling and appalling that the studied efforts of the framers of our Constitution and its Bill of Rights, should be assigned an intent that could not possibly be found in what they said after inspired deliberations, profound thinking, great learning, and close experience with a system they sought, by risking their lives and property, to eliminate from this new country, and the future generations to come.

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2. In Colorado, the preliminary hearing, designed to bind over for trial only those persons against whom a probable cause case has been made, is utterly farcial. The hearing rarely lasts over one half hour, and with very rare exceptions, all are bound over. The term "probable cause" simply means in practice a modicum of evidence, most often hearsay.

We are not dealing here with an obscure thought, experience, statute, ordinance or rule of law. We are concerned with what the Founders said with regard to individual liberties. They sought to protect the individual from arbitrary and often odious treatment when accused of a crime, or about to be so accused. They sought to regulate in a democratic fashion the right of the people to be secure in their persons, homes, papers, and effects from unreasonable searches and seizures, and demanded that no warrant shall issue except upon probable cause supported by an oath or affirmation of the accuser. This meant the interposing of an impartial judicial officer between the accuser and the accused, and the right to deny the issuance of a warrant if probable cause was not found.

The concept of the arrest warrant under the Fourth Amendment is a magnificent concept and inextricably tied to it is the practical doctrine of exigent circumstances, which, of course, has lost its vitality under *Watson* and in those states which have chosen to follow *Watson*, and the states which ignored the doctrine even before *Watson*.

In *Watson*, the Court, in what appears to be pure dicta, and in a ruling not required by the facts of the case, approved long-standing acceptance in state courts of the English common law as determining that arrest warrants are no longer required. There is no other way to interpret the case except, and this is a razor's edge distinction, when the arrest is sought to be made in a private residence, and not in a public place. *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).

Watson did not approve all warrantless arrests, but somehow appeared to arrive at that point. The case

points out that 18 U.S.C. § 3061(a)(3), which gives postal inspectors the right to warrantless arrests, and which resulted in Watson's arrest, was the considered judgment of Congress that it is not unreasonable for postal inspectors to arrest without a warrant provided they have the magic formula of probable cause.[3] The Court reflected on a number of other federal law enforcement agents who also have such rights: Federal Bureau of Investigation agents, United States marshals, drug enforcement agents, the Secret Service, and the Customs Service. The result has been that states like Colorado, which had vigorously enforced the Fourth Amendment in this area, now have the power to not only ignore their own constitutional provisions, but to pass statutes which make a mockery out of the deeply felt concerns of the Founders to afford more liberties to their constituents than those afforded by their mother country, England. The point being made is that *Watson* was a relatively simple case which went much further than the facts presented to the Court, and probably further than the Court itself anticipated.

In *Watson,* an informer deemed to be reliable, gave information to postal authorities that Watson possessed stolen credit cards. He met Watson in a restaurant, and upon a given signal, which meant that Watson had stolen credit cards in his possession, an arrest was made and he was taken into custody. He gave the officers consent to search an automobile where two more stolen credit cards were found. The defense that the arrest was unlawful because it was warrantless, there being no exigent circumstances, was rejected by a majority of this Court, and the rule laid down that probable cause alone was sufficient to make a warrantless arrest *in public.* Where

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3. See footnote two as to the present state of the notion of probable cause, at least in Colorado.

the Court found assistance in the language of the Fourth Amendment, or in the records of the Constitutional Convention, which allows such a distinction remains a mystery.

As pointed out in a concurring opinion and the dissent, there was no reason to reach the question of exigent circumstances. Not only was there probable cause, but there were exigent circumstances since the arrestee was in the actual process of committing a crime, and in the presence of the arresting officers. Traditionally, and with good cause, under such circumstances exigent circumstances existed and a warrantless arrest is permissible. But, the Court seized upon this opportunity to base its decision upon probable cause, and in the process, to effectively discard, once and for all, the doctrine of exigent circumstances so long as the arrest is made in a public place.

The decision has had a decided effect on the State of Colorado. Prior to *Watson,* Colorado had adhered strictly to Article II, Section 7 of its Constitution which required not only probable cause, but a warrant supported by an oath or affirmation reduced to writing. Its General Assembly codified these requirements in C.R.S. § 16-3-102, *supra,* which required an arrest warrant if possible. The constitutional provision is still in effect, but, obviously relying on *Watson,* the General Assembly amended this statute in 1977, eliminating the requirement of a warrant if there is probable cause. The statute, prior to the 1977 amendment, provided in pertinent part:

> 16-3-102. *Arrest by peace officer.* * * * (1)(c) He has probable cause to believe that an offense was committed and has probable cause to believe that the offense was committed by the person to be arrested. An arrest warrant should be obtained when practicable.

To further compound Colorado's confusing but loyal adherence to *Watson,* Rule 4.2 of its Rules of Criminal Procedure has remained unchanged and provides that if a warrant for arrest is sought prior to the filing of an information, an affidavit must be sworn to or affirmed before a judge which relates facts which establish probable cause. See *supra.* Furthermore, C.R.S. § 16-3-108 remains unchanged and contains identical provisions.

Colorado has a series of cases which burgeoned after *Watson,* and even before its General Assembly enacted § 16-3-102 *supra.* Until the instant case appeared, the Colorado appellate courts had not relied upon the statute, but upon *Watson.*

In *People v. Tangos,* 190 Colo. 262, 545 P.2d 1047, the Colorado Supreme Court put it bluntly:

> When the facts establish probable cause, we are no longer required to determine whether exigent circumstances justify a warrantless arrest in a public place.

(545 P.2d 1049)

The court pointed out that in view of the fact that the constitutional dimensions of the question of exigent circumstances has now been reduced to a rule of "judicial preference," it must now conclude that probable cause alone is sufficient to justify the arresting officer's action. C.f. *People v. Hoinville, supra.*

The uncertainty of the Colorado Supreme Court after *Watson* was evident in *People v. Glasener,* 191 Colo. 114, 550 P.2d 851 (1976), where it stated that it intimated no view of whether the Colorado statute requiring an arrest warrant was applicable to the case. While the General

Assembly attempted to resolve this uncertainty by enacting C.R.S. § 16-3-102, *supra,* the line of Colorado cases abrogating the requirement of exigent circumstances for a warrantless arrest all rest their decision on *Watson.* E.g. *People v. Valesquez,* 641 P.2d 943 (Colo. 1982).

Watson opened the door to a potpourri of state statutory provisions emasculating not only the Fourth Amendment in this context, but ignoring their own constitutional provisions, as in Colorado. The nature of a petition for certiorari does not allow an in-depth analysis of what the states are doing, but a few examples may suffice.

Hawaii Revised Statutes (1976 Supp.), § 803.5, is a good example:

> Policemen or other officers of justice, in any seaport or town, even in cases where it is not certain that an offense has been committed, may, without warrant, arrest and detain for examination such persons as may be found under such circumstances as justify a reasonable suspicion that they may have committed or intend to commit a crime.

In other states, such terms as "reasonably believes" (Florida Statutes Ann. § 101.15); "reasonable grounds" (Arkansas Statutes 1977 Repl.Vol. § 43-403); "reasonable cause" (Idaho Code, § 19-603); have crept into statutes dispensing with the necessity of an arrest warrant under any circumstances with the possible exception of an arrest in a residence.

Another matter of concern is that the acts of Congress granting certain agencies the power to arrest on probable cause only, has been expanded in Colorado to include all peace officers. This is undoubtedly the case

throughout the country. Thus, such peace officers, whether agents of administrative agencies such as the Colorado Game, Field and Parks Commission, or small-town constables, have the awesome power to arrest on hearsay, weak accusations, speculation, conjecture, surmise, and possible mere enthusiasm.[4]

Watson recognizes that not all federal officers have been given the authority enjoyed by the postal inspectors, and are subject to more restrictive standards, but, this is small solace to the petitioner and others like him. The floodgates are open. What this has led to in 1986, ten years after *Watson,* is surely a subject to be reexamined by the Court.

We shall briefly turn to *Watson* and the underpinnings relied upon by the court to justify changing the plain language of the Fourth Amendment, and inferentially giving Colorado the right to disregard its own constitutional provisions (Article II, Section 7 of the Constitution of Colorado).

The court states that it has never invalidated an arrest supported by probable cause solely because the officer failed to serve a warrant (423 U.S. at 418). However, in his concurring opinion, Justice Powell points out that *Watson* is the court's first "square holding" that the Fourth Amendment permits a duly authorized law enforcement officer to make an arrest in a public place even though he has had adequate opportunity to procure a warrant after developing probable cause for the arrest (423 U.S.

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4. It is interesting that as late as 1981, the Colorado Supreme Court stated that an arrest without a warrant is presumed to be unconstitutional. *People v. Burns,* 200 Colo. 387, 623 P.2d 397 (Colo. 1981).

at 427). We respectfully suggest that this first pronouncement of the highest court in the land on warrantless arrests in public places could have been bottomed on probable cause only, and is unfortunate that it did not do so in six respects: (1) It is dicta since exigent circumstances were present in that the crime was being committed in the presence of the postal inspectors; (2) the court relies upon custom, that is, many states have already reached the *Watson* conclusion; (3) the court relied upon history and the common law of England; (4) the court reaches the unwarranted conclusion that it would be a hardship upon law enforcement officers to obtain warrants when practicable; (5) the court draws a distinction between warrantless arrests in public and private places; and (6) the court does not appear to equate a search warrant and an arrest warrant.

Space does not permit the detailed analysis of each of these points, and we shall be brief in confining our comments to what appears to be the real basis of the court's decision: the English common law.

The court points out that a peace officer was permitted to arrest without a warrant for a misdemeanor or a felony committed in his presence as well as for a felony not committed in his presence if there was reasonable grounds for making the arrest. As Justice Brennan commented, to apply this rule blindly under present-day circumstances is to try to interpret Hamlet's admonition to Ophelia, "Get thee to a nunnery, go." A nunnery in Elizabethan times was a brothel.

The framers were well aware of the excesses of the English common law as it related to criminal offenses, and its wide range of punishment as between misdemean-

ors and felonies. Not only that, but what was a serious crime under common law may not be so now.

For instance, an assault was a misdemeanor even if made with the intent to rob, murder, or rape. Kidnapping, forgery, mayhem, perjury and riots were also of misdemeanor status. Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 572-573 (1924). To discharge a pistol at the king at one time was a misdemeanor. 9 *Halsbury's Laws of England* 459 (1909). Since many of the misdemeanors in that day are felonies today, it would appear quite clear that reliance on the common law rule is misplaced. Furthermore, it is hard to believe that the drafters of our Constitution would be inclined to follow a system which, at the time of Blackstone, the number of capital offenses reached an appalling total of 160. Sentences of death could be imposed for robbing a rabbit warren, cutting down a tree, stealing goods of the value of five shillings from a shop, or forty shillings from a dwelling, or impersonating a pensioner. John Laurence, *A History of Capital Punishment*, p. 13 (1960).

Again, space will not permit in-depth comment on the hardship *Watson* believes will be endured by police, except to state that this is an illusion. Modern police methods and technology begs another look at this theory, as does the court's bifurcating of the standards governing search warrants as opposed to arrest warrants, and public and private places.

Finally, the court's conclusions about litigation over what are exigent circumstances appears to be unfounded. It is suggested that probable cause is a more ephemeral subject than exigent circumstances. The reliability of an informer adds an extra dimension.

2. Absent exigent circumstances, it is constitutionally impermissible to draw a distinction between a warrantless arrest in a residence and a warrantless arrest in a public place.

Payton v. New York, supra, decided that a warrantless entry into a house in order to make an arrest, in the absence of consent or exigent circumstances, violates the Fourth Amendment. This case stands for the proposition that the doctrine of exigent circumstances is not completely dead, but may be expiring since the zone of privacy rule is whittling away at the concept. See *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976), where a distinction was drawn between a woman standing in the doorway of her house, and being inside the house. Held: While standing in the doorway, she was in a public place. For purposes of the Fourth Amendment, she had no expectation of privacy because she was exposed to the public view, speech, hearing, and touch, as though she was standing completely outside her house. The fact that she retreated into the house could not defeat a warrantless arrest which had been set in motion in a public place.

This sort of hair-splitting teaches nothing. A proper analysis should not involve zone of privacy considerations, but the fact that the police had probable cause and, because the lady was holding a brown paper bag which could contain disposable drugs, exigent circumstances did exist. The exposure to public view discussion added nothing to one's store of knowledge.

The point being made here is that the dichotomy between warrantless arrests in residences and in public places is needless, unworkable, and should be reexamined.

When one is on the street, it is expected that that person's personal, physical and emotional integrity will be respected and protected. This right can be assumed. It makes absolutely no difference, and has no lesser or greater impact upon that individual's dignity and feelings if he is arrested on the street, or if a policeman walks through an open door of his living quarters, and performs an arrest. In both cases, in the absence of exigency, a warrant should be obtained. The distinction is meaningless and should be abandoned for the sake of uniformity, and in view of the failure of the Fourth Amendment to make such a distinction.

3. The back seat of a police car parked outside of an arrestee's motel room is not a public place.

If the residence-public place dichotomy is followed here, then another issue must be determinel: Is the back seat of a police car a public place? Petitioner was in a motel room and left it to sit in the police car where he filled out a stolen vehicle report, and was then arrested without a warrant, not for making the report, but for theft.

Under *Santana,* there is no evidence of exposure to public view, speech, hearing, and touch. Indeed, the inside of a police car certainly cannot be characterized as a public place. It is an example of what cases like *Santana* lead to, and why the residence-public place distinction should be abandoned in favor of the Fourth Amendment consistency which existed, at least in spirit, prior to *Watson:* There should be no warrantless arrests when the procuring of a warrant is feasible.

CONCLUSION

Justice Brennan, dissenting in *United States v. Miller*, 425 U.S. at 454, 96 S.Ct. 820, 48 L.Ed.2d 71 (1976), sums up what the states are doing in light of decisions like *Watson*:

> We call attention to the emerging trend among high state courts of relying upon state constitutional protections of individual liberties—protections pervading counterpart provisions of the United States Constitution, but increasingly being ignored by decisions of this Court.

For the reasons above expressed, a writ of certiorari should issue to review and reconsider *United States v. Watson, supra*, and the constitutionality of § 16-3-102 of the Colorado Revised Statutes.

Respectfully submitted,

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APPENDIX

(Filed September 12, 1985)

COLORADO COURT OF APPEALS

No. 83CA0932

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,

v.

HARRY A. STROZZI,
Defendant-Appellant.

Appeal from the District Court of Jefferson County
Honorable Gaspar F. Perricone, Judge

DIVISION I **JUDGMENT AFFIRMED**

Opinion by JUDGE PIERCE
Kelly and Babcock, JJ., concur

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Defendant, Harry A. Strozzi, appeals from the judgment of conviction entered following a jury verdict finding him guilty of one count of theft over $10,000 and one count of theft of more than $200 but less than $10,000. We affirm.

The prosecutor's evidence showed that defendant was an independent trucker who was hired to haul a trailer containing food items from Arizona to Minnesota. Shortly after defendant picked up the load, he met a man at a truckstop who talked him into a scheme that he claimed would help defendant out of his financial trouble. The plan called for defendant to sell his truck, trailer, and cargo to a third party through this man for $25,000. Then defendant would report his truck stolen, and the insurance proceeds would pay off his loan on the truck.

Defendant's accomplice unknowingly arranged to sell the truck and its cargo to a police undercover agent in Colorado. Defendant's accomplice was arrested shortly after the sale took place, and he fully implicated the defendant. The accomplice cooperated with the police by allowing them to listen to a telephone conversation between him and defendant in which they discussed completing the deal and splitting the money from the sale. According to plan, defendant contacted the police the next day to report his truck stolen and was arrested when he signed the stolen truck report.

Defendant's defense was that he changed his mind and had abandoned his plan to sell the truck prior to getting to Colorado but that he was forced to go through with the crime by the threats of his accomplice.

I.

Defendant contends the trial court erred in admitting evidence of the telephone conversation between defendant and his accomplice. We disagree.

Defendant's argument is two-pronged. He first argues that he had an absolute expectation of privacy in his telephone conversation with his accomplice so any police interception of the conversation was a search and seizure within the meaning of the Fourth Amendment. Thus, since police did not get a warrant prior to taping the conversation, the telephone conversation should have been suppressed as the product of an illegal search. Defendant, alleging that the accomplice was a police agent, also argues that he was entitled to receive *Miranda* warnings before speaking with his accomplice on the phone.

A.

A defendant does not have a justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to police. *United States v. White,* 401 U.S. 745, 91 S. Ct. 1122, 28 L.Ed.2d 453 (1971); *People v. Velasquez,* 641 P.2d 943 (Colo. 1982); *People v. Palmer,* 652 P.2d 1092 (Colo. App. 1982). A police agent who conceals his police connections may either report or record a conversation with a defendant without violating defendant's Fourth Amendment rights. *United States v. White, supra; Hoffa v. United States,* 385 U.S. 293, 87 S. Ct. 408, 17 L.Ed.2d 374 (1966). Also, there is no violation of the Colorado Constitution so long as the police agent does not unlawfully intercept the communication with the defendant. *People v. Morton,* 189 Colo. 198, 539 P.2d 1255 (1975), *cert. denied,* 423 U.S. 1053, 96 S. Ct. 783, 46 L.Ed.2d 642 (1976). More-

over, there is no unlawful interception of a phone call if one party to the conversation agrees to allow the police to tape the call. See §18-9-304(1)(a), C.R.S. (1978 Repl. Vol. 8); *People v. Morton, supra.*

Here, because defendant had no expectation of privacy in the telephone conversation with his accomplice, the police were not required to obtain a warrant before taping the conversation. Furthermore, because the accomplice consented to allow the police to listen to and tape the conversation, the police action was not illegal and did not violate Colo. Const. art. II, §7. Thus, the trial court did not err in refusing to suppress the conversation on this ground.

B.

Voluntary statements unknowingly made to an informant are not protected by the Fifth Amendment privilege against compulsory self-incrimination. In such situations, *Miranda* warnings are not required. *Hoffa v. United States, supra; People v. Aalbu,* 696 P.2d 796 (Colo. 1985); *People v. Battle,* 694 P.2d 359 (Colo. App. 1984). Statements are voluntary if they are made without threats of violence or induced by promises. *People v. Bookman,* 646 P.2d 924 (Colo. 1982).

Here, even if the accomplice was a police informant, he was not required to give defendant *Miranda* warnings before talking to him on the phone. In addition, although one of defendant's theories of defense is that he was coerced to participate in this scheme, there was no evidence that he made the statements in the phone call as a result of threats or promises. The transcript of the conversation does not indicate that defendant's accomplice threatened or promised him anything to induce his statements. The

trial court did not err in finding these statements voluntary and allowing admission of the statements into evidence.

II.

Defendant next contends the trial court erred in admitting evidence that defendant reported his truck and trailer stolen just prior to his arrest. We disagree.

A.

Defendant first argues that his false theft report was inadmissible because he was not given *Miranda* warnings before making the report. Even though defendant called the police and asked them to meet him at the truck stop to take a stolen truck report, defendant claims the report was the product of a custodial interrogation. In support of this claim, defendant argues that the police had focused their investigation on him and he gave the report while seated in the back seat of the patrol car.

Interrogation is custodial when it is initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966); *People v. Thiret,* 685 P.2d 193 (Colo. 1984). The test of when a person is in custody is whether a reasonable person in the defendant's circumstances would have believed that he was free to leave the officer's presence. *People v. Thiret, supra; People v. Johnson,* 671 P.2d 958 (Colo. 1983). The court must consider the totality of the circumstances surrounding the interrogation in determining what belief was reasonable. Among the many factors

to be considered in this determination are the time, place, and purpose of the interrogation. *People v. Thiret, supra; People v. Johnson, supra.*

Here, the police met defendant at the truckstop at defendant's request. The officer taking the report testified that although defendant was sitting in the patrol car, he was not handcuffed and was free to go at any time until he signed the false report. There was no evidence presented that defendant felt he was not free to leave at the time he gave the false theft report. Under these circumstances the court properly ruled that the defendant was not in custody and, thus, not entitled to *Miranda* warnings at the time the report was made. Hence, it was not error to admit the evidence of the defendant's false theft report.

B.

Even though the report was taken before defendant was arrested, he argues that the theft report was the inadmissible fruit of an illegal arrest. Defendant contends that he was illegally arrested because the police did not have a warrant or exigent circumstances to arrest without a warrant. Defendant does not dispute that the police had probable cause to arrest.

Defendant's argument is based upon the arrest statute before the 1977 amendment that removed the warrant requirement. The law no longer requires an officer with probable cause to obtain an arrest warrant when practicable. *See* §16-3-102(1)(c), C.R.S. (1978 Repl. Vol. 8). Thus, defendant's claim is without merit.

III.

Defendant next contends that the trial court erred in admitting his confession to the crime charged. We disagree.

Defendant argues that his confession was involuntary because he was "shaken up" by being arrested and confronted with the evidence against him. The officer taking the statement testified that defendant was coherent, fully understood what was going on, and was cooperative. Defendant does not contend that he was threatened or promised anything in exchange for his testimony or that the evidence that he was confronted with was false or misleading. The trial court ruled the defendant's confession was voluntary and followed a proper advisement and waiver of his *Miranda* rights.

To be admissible in evidence, a confession must be shown to be free and voluntary, made without threats of violence or promises of special consequences and made without the exertion of improper influences. *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L.Ed.2d 747 (1970); *People v. Bookman, supra; People v. Parada*, 188 Colo. 230, 533 P.2d 1121 (1975). The voluntariness of the confession must be determined by looking at the totality of the circumstances surrounding the giving of the statement. *People v. Bookman, supra.* On appeal, the trial court's finding of fact on the voluntariness issue will not be reversed where the findings are supported by adequate evidence in the record. *People v. Fordyce*, 200 Colo. 153, 612 P.2d 1131 (1980).

Here, there is no evidence in the record that defendant's statements were induced by promises, threats, or

improper influences. The evidence that defendant understood what was going on and was cooperative supports the trial court's findings that defendant's confession was voluntary. It was not error to admit defendant's confession.

IV.

Defendant contends the trial court erred in denying his motion for mistrial based upon prosecutorial misconduct. We disagree.

Defendant complains that the prosecutor argued facts not in evidence in his closing argument. In his closing argument defendant insinuated that the accomplice's case was plea bargained in exchange for the accomplice's testimony against him. The prosecutor, in his final closing argument, reminded the jury that the evidence did not support this insinuation. The prosecutor then went on to explain that it was not unusual to plea bargain a case in a county where 5,000 cases a year are filed because not every case can be tried. The defendant objected that these comments were not supported by evidence in the record. The court overruled the objection and allowed the prosecutor to make his point.

Determination of whether the prosecutor's closing argument is improper depends upon the nature of the comment and whether the jury's attention has been directed to something which it is not entitled to consider. *People v. Constant*, 645 P.2d 843 (Colo. 1982). Comment on facts not in evidence is unprofessional conduct only if such facts are not matters of common public knowledge. ABA, *Standards for Criminal Justice*, Standard §3-5.9 (2d Ed. 1982).

The granting or denial of a motion for a mistrial is within the sound discretion of the trial court, and its determination will not be disturbed on review unless it is apparent the court abused its discretion resulting in a denial of justice. *People v. Ferrell,* 200 Colo. 128, 613 P.2d 324 (1980).

Here, the prosecutor's explanation of the reason for plea bargaining was of common knowledge, and was neither improper nor prejudicial. Thus, the court did not abuse its discretion in denying defendant's motion for a mistrial based solely on this comment.

Judgment affirmed.

JUDGE KELLY and JUDGE BABCOCK concur.

THE COURT OF APPEALS OF THE
STATE OF COLORADO

Case Number 83CA0932

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,

v.

HARRY A. STROZZI,
Defendant-Appellant.

ORDER

Upon consideration of the Petition for Rehearing filed by the appellant herein, said Petition is hereby DENIED. It is ordered that issuance of the Mandate hereby be, and the same hereby is, stayed to and including 11-12-85, provided that if Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the within cause by the Supreme Court.

Pierce, J.
Kelly, J.
Babcock, J.

(SEAL)

DATED: 10-10-85

SUPREME COURT, STATE OF COLORADO

Case No. 85SC443
Certiorari to the Colorado Court of Appeals 83CA0932
Jefferson County District Court 82CR1048

ORDER OF COURT

HARRY A. STROZZI,
Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,
Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JANUARY 31, 1986.

cc: Gary Sonke, Clerk
Colorado Court of Appeals

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